United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

10-4

74-2021

To Be Argued By
HAROLD BAER, JR.

B P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2021

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v-

WILLIAM DEL TORO and
WILLIAM KAUFMAN,

Defendants-Appellants.

On Appeal from the United States District Court
For the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT WILLIAM KAUFMAN

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BRIEF FOR DEFENDANT-APPELLANT WILLIAM KAUFMAN

Preliminary Statement

Appellants William Del Toro and William Kaufman appeal from a judgment of conviction entered on July 25, 1974, in the United States District Court for the Southern District of New York after a two week trial before the Honorable Whitman Knapp, United States Judge, and a jury.

Indictment 73 Cr. 289 WK, filed April 4, 1973, charged three defendants, including William Del Toro and William Kaufman in twenty counts. Del Toro and Kaufman,

and a third defendant, Ralph Ruocco, were charged in Count One with conspiracy to defraud the United States in violation of Title 18 U.S.C. Section 371, and in Counts Two and Three of offering a bribe of $15,000. to Pedro Morales, a public official employed by the Model Cities Administration, and of actually giving Morales $500. in violation of Title 18 U.S.C. Sections 201(b) and 2. In addition, defendant Del Toro was charged in Counts Four through Ten and defendant William Kaufman was charged in Counts Eleven through Sixteen with making false statements before a grand jury in violation of Title 18 U.S.C. Section 1623. Prior to trial defendant Ruocco pleaded guilty to one count of conspiracy (Title 18 U.S.C. Section 371) before Judge Knapp on February 22, 1974, and Counts Seventeen through Twenty were dismissed.

On May 29, 1974, the trial of defendants Del Toro and Kaufman commenced as to Counts One through Ten, Twelve, Thirteen and Sixteen. Judge Knapp granted a defense motion to dismiss Counts Eleven, Fourteen and Fifteen on the ground that they had been recanted in accordance with Title 18 U.S.C. Section 1623(d). The jury returned a verdict of guilty as to all counts

except Count Eight (one of the Del Toro perjury counts), on June 11, 1974.

At the close of the Government's case, at the end of the defense case and at a hearing of post-trial motions on July 9, 1974, Judge Knapp denied motions by both defendants to dismiss counts of the indictment and motions for a judgment of acquittal.

On July 25, 1974, defendant Kaufman was sentenced by Judge Knapp to concurrent terms of four years on each count. Defendant Del Toro was sentenced to concurrent terms of one year and one day on each count. Defendant Ruocco was sentenced to a term of one year and one day.

Judge Knapp denied bail pending determination of an appeal at the time of sentencing, but the United States Court of Appeals for the Second Circuit granted a stay of execution of sentence pending determination of the appeal to all defendants on August 13, 1974 upon motions by defendants Kaufman and Del Toro. All defendants are presently released on their own recognizance pending determination of the appeal.

STATEMENT OF FACTS

Synopsis

Pedro Morales, a corrupt Deputy Assistant Administrator in the Harlem-East Harlem Model Cities Administration, was arrested on September 1, 1972 in connection with his acceptance of a half share of bribes totalling over $51,000. from two operators of summer camps used by the Model Cities summer camp program and from the owner of a building in Harlem leased by the Model Cities program. In contrast, this case concerns an alleged payment of a bribe of $500. Directly following his arrest, Morales admitted accepting bribes and agreed to cooperate with the United States Attorney's Office for the Southern District of New York. He acted as an undercover agent and tape recorded conversations with others suspected of criminal activity. While acting as an undercover agent Morales continued to pose as a decoy, and at the request of the United States Attorney's Office

remained on the payroll as a Model Cities employee.

Morales taped conversations with William Kaufman, a lawyer and real estate broker who was attempting to sub-lease for a commission the Ludwig Baumann Building in East Harlem, for Acme-Hamilton Corporation which owned a long-term lease for the building. These conversations occurred between September 20, 1972 and January 26, 1973. As a result of these conversations Morales received $500. in cash from William Kaufman, and was promised $14,500. more, when the lease was signed.

On February 2, 1973, William Kaufman testified before a federal grand jury. He denied that he had paid Morales $500. He denied that more had been promised in exchange for a lease by Model Cities for the Ludwig Baumann Building. Kaufman also denied that he had spoken to William Del Toro about his payment of money to Morales. Kaufman recanted most of his false statements right then and there in the grand jury room. He admitted his involvement with Morales completely. He agreed to cooperate with the Government and to serve as an undercover agent

for the Government by tape recording conversations with Del Toro and Ralph Ruocco, who was Assistant to the President of the Acme-Hamilton Corporation. Kaufman engaged in one taped conversation with Del Toro and two taped conversations with Ruocco. He ceased to cooperate with the Government after approximately two weeks when he was asked to implicate the President of Acme-Hamilton with whom he had no dealings.

During and immediately following his period of cooperation with the Government, Kaufman appeared three times before the grand jury (on February 9, 16 and 23, 1973), but the Assistant United States Attorney asked few if any questions and none about Kaufman's involvement with Morales, Del Toro or Ruocco, or about his testimony before the grand jury on February 2.

Del Toro appeared before the grand jury on February 16, 1973 and denied that he had served as an intermediary between Kaufman and Morales as well as that he had been involved in offering or making the payment of a bribe to Morales.

The defendant Kaufman contended that he was compromised by the Government, entrapped by Morales and that in any event Morales had not in fact been a public official acting on behalf of the United States as required by the bribery statute. Further, it was argued that he recanted any false statements made before the grand jury on February 2, 1973. Del Toro's defense was that he had not been involved in Kaufman's attempt to bribe Morales, and that his discussions with Morales were intended only to put Morales off without alienating him, not to involve him in a conspiracy to bribe Morales.

Pedro Morales' Arrest and Cooperation

Pedro Morales was arrested on September 1, 1972 and charged, although he does not appear to have been arraigned (Tr. 203-04), with the acceptance of bribes while a Deputy Assistant Administrator in the Harlem-East Harlem Model Cities Administration. On September 5 or 6, 1972, he agreed to cooperate with the United States Attorney's Office by posing as a corrupt official within the Model Cities

Administration. He was debriefed by two or more Assistant United States Attorneys but never mentioned the involvement in any wrongdoing of Kaufman or Del Toro or for that matter Ralph Ruocco. Thereafter and with the intervention of the United States Attorney's Office, he continued to go to his office and draw his salary while at the same time taping his coached and prepared conversations with individuals suspected by the Government of engaging in criminal activities (Tr. 47-61, 206-12).

The Tape Recorded Conversations Between Pedro Morales and Defendants Del Toro and Kaufman

Morales taped seven conversations between himself and either Del Toro or Kaufman between September 20, 1972 and January 26, 1973. The subject matter of prospective conversations were suggested and rehearsed with the Assistant United States Attorneys and investigators working for them.

Morales testified at trial that on September 20, 1973 while he was wearing a recorder and transmitting device and waiting in his office to see John Sanders, who was then his immediate superior and the Administrator of the Harlem-East Harlem Model Cities Office, William Kaufman unexpectedly entered his office to discuss the leasing by Model Cities of the Ludwig Baumann Building (Tr. 61-64). During this conversation Morales suggested a lease for the Ludwig Baumann Building through Model Cities in exchange for a bribe to him. He said that the first such conversation occurred in August 1972. This was never corroborated in any way, and although Kaufman said that he had sent a message to Morales concerning the lease through Del Toro, Morales responded that Del Toro had never given him the message (GX 1, 21; Tr. 66-77, 264-276, 281-88).

On October 26, 1972, pursuant to instructions from the United States Attorney's Office, Morales went to Del Toro's office in East Harlem to tape a conversation with Del Toro concerning his deal with Kaufman. At this meeting Morales discussed his meeting with Kaufman on

September 20th, and asked Del Toro for information about Kaufman. He also asked for advice as to how he should deal with Kaufman regarding their agreement. Del Toro responded that he had worked with Kaufman before and found him cooperative, but Morales expressed concern that Kaufman could not be trusted because he had refused to pay Morales any money in advance (GX 4, 22; Tr. 95-105).

Several days later, on October 30, 1972, Morales met with Kaufman at the Harlem-East Harlem Model Cities offices. Kaufman told Morales that he would receive $15,000. for getting the Model Cities Administration to lease the building. Kaufman also told Morales that he could not get money in advance for Morales. Morales agreed to push the deal through as quickly as possible, but urged Kaufman to try to get him some money in advance. Shortly after Kaufman left Morales' office, Del Toro arrived and discussed the agreement that Morales had just made with Kaufman. Del Toro denied repeatedly that he was benefiting from the deal between Kaufman and Morales in any way,

and assured Morales that Kaufman could be trusted (GX 5, 23; Tr. 112-27).

On November 9, 1972, Morales again went to speak with Del Toro in the latter's office. At this meeting, Morales again expressed concern that Kaufman was not willing to give him any money in advance. Del Toro reassured him and offered to intercede if Morales wanted him to do so. Del Toro also said that Kaufman had indicated that he would be willing to pay Morales $2,000. in advance (GX 6, 24; Tr. 135-43).

On November 13, 1972, Morales and Kaufman met in Morales' automobile near the Ludwig Baumann Building. At this meeting Morales pressed and cajoled Kaufman repeatedly for an advance payment of some kind, but Kaufman replied that he could not pay him any money in advance. Morales threatened Kaufman that he would not act unless Kaufman paid him some money in advance, but Kaufman again refused, and Morales responded by reminding Kaufman that he could kill the deal entirely if he wanted to do so (GX 8, 25; Tr. 145-61).

A final meeting between Morales and Kaufman took place on January 26, 1973 in an automobile driven by Morales in Harlem. At this meeting Kaufman paid Morales $500. in cash and Morales agreed that he would push the deal to completion as soon as he could (GX 11, 26, 168-73).

Kaufman's Appearance Before The Grand Jury on February 2, 1973 And His Cooperation With The Government

On February 2, 1973, Kaufman appeared before a grand jury in the Southern District of New York and was questioned about bribery and corruption within the Model Cities Administration, particularly with respect to Morales and Del Toro. Kaufman initially denied involvement with Morales and denied offering him a bribe or paying him any money. He further denied having any discussions with Del Toro concerning an offer of a bribe to Morales. Later, Kaufman admitted that he had discussed the payment of a bribe with Morales, but continued to deny that he had offered him a bribe, or that he had discussed the matter

with Del Toro. Kaufman was warned by the Assistant United States Attorney in the grand jury that any false answers could be punished by prosecution for perjury, but the existence of a recantation provision was not mentioned (Tr. 697-756).

Immediately after he testified before the grand jury on February 2, 1973, Kaufman was invited by Assistant United States Attorney Rudolph Giuliani to discuss his testimony in the latter's office. After telling Kaufman that he knew Kaufman had testified falsely before the grand jury and that he had tape recordings to prove it, Giuliani read Title 18 U.S.C. Section 1623(d) to him, apparently in the belief that by doing so he could effectively preclude Kaufman from further recantation* (Tr. 832-40).

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* Kaufman had already recanted his other false statements while he was before the grand jury, and Judge Knapp recognized this by dismissing three perjury counts on motion on the ground that with respect to them, Kaufman had recanted in the grand jury at the same session at which he made them and before he went downstairs with the Assistant United States Attorney.

After he left Giuliani's office, Kaufman immediately went to his lawyer Irwin Klein to discuss his testimony before the grand jury and his conversation with Giuliani. Klein, the same afternoon called to make a date to discuss the case as soon as possible (Tr. 1252-55).

After the weekend, on Tuesday, February 6, 1973, Kaufman and Klein went to the United States Attorney's Office, and Klein discussed the matter with Giuliani. At that time, Kaufman agreed to cooperate with the Government and that in exchange he would plead to a single conspiracy count in any forthcoming indictment. It was understood and agreed that there would be no perjury counts in any such indictment or that if there were they would be there for Kaufman's benefit and to serve as a bar to future prosecution and that they would be dismissed on motion by Kaufman (App. Tr. 841-46, 850-856, 1255-59).

Kaufman began to cooperate with the Government that day, (App. Tr. 856) or shortly thereafter. In the course of his cooperation with the Government, Kaufman discussed fully his participation in the alleged scheme to defraud.

He made several tapes of conversations with Del Toro and Ruocco. On February 13, 1973, he participated in a carefully prepared and rehearsed conversation with Morales and Ruocco concerning the leasing of the Ludwig Baumann Building. At this meeting, which took place at the Baumann Building itself, Ruocco told Morales that he would get the remainder of the money that was promised to him when the lease for the building was signed. Ruocco further agreed that the $500. which Kaufman had paid Morales was just a token of good faith, and that the remaining $14,500. due Morales would be paid when the lease was signed (GX 12; Tr. 504-07).

The next day, on February 14, 1973, Kaufman telephoned Ruocco from the New York City Department of Investigation. During this conversation, Ruocco reaffirmed the agreement with Morales and said that once a lease for the Ludwig Baumann Building had been signed, Morales would be paid the remaining $14,500. promised to him as a bribe (GX 20; Tr. 508-509).

Kaufman appeared before the grand jury four times between February 2, 1973 and February 23, 1973. His appearances on February 9 and February 16, 1973 were made while he was cooperating with the Government, and at those sessions he was asked no questions by the Government and made no statements himself. At his final appearance before the grand jury on February 23, 1973, while he was still unclear as to what his position really was, he was asked only to identify his lawyer by name and excused (Tr. 753-56).

During his period of cooperation Kaufman admitted his full involvement with Morales, Del Toro and Ruocco and that he had made false statements before the grand jury. It was his understanding that in view of his cooperation no perjury charges would ever be directed against him and therefore that formal recantation (which could easily have been accomplished before the grand jury) was unnecessary (Tr. 1255-59).

Kaufman's efforts resulted in tape recordings which materially aided the Government in obtaining

convictions against Del Toro, Ruocco and himself and without his cooperation it is clear that Ruocco could not have been indicted or convicted.

Indictment and Trial

On April 4, 1973, the grand jury indicted Kaufman for conspiracy, bribery and perjury; on February 22, 1973, Ruocco pleaded guilty to one count of conspiracy; and on June 11, 1973, Kaufman and Del Toro were tried before the Honorable Whitman Knapp and a jury. At trial, Morales and Ruocco testified for the Government, and testified in substance to their tape recorded conversations with Kaufman and Del Toro.

Kaufman's defense was that Morales had been used to entrap him; that the conduct of the Government had created the situation whereby he had been induced by Morales to offer him a bribe and to lie to the grand jury; that the Government had failed to keep its word; and that he had been denied the opportunity to recant properly as a result of his subsequent cooperation with the Government. Kaufman did not take the stand during the trial, and other than character witnesses, his only witnesses at trial

were Stanley Lupkin, the First Commissioner of the Department of Investigation of the City of New York, and Irwin Klein, Kaufman's lawyer at the time of his cooperation with the Government.

Defendant Del Toro took the stand and testified at length to the effect that he had not been aware that Kaufman had offered Morales a bribe, and that he had only listened to Morales in order to placate him.

POINT I

NO GRAND JURY INVESTIGATION SHOULD BE USED, AS IT WAS HERE, TO CREATE WRONGDOING OR FORECLOSE RECANTATION

The failure of the Government to reveal the existence of tape recorded conversations between appellants and Pedro Morales was unfortunate. The invitation to testify before the grand jury in this case, served only to create perjury charges against them and such conduct should not be permitted. Furthermore, the attempt by the Assistant United States Attorney to foreclose Kaufman from complete recantation should not be countenanced. To use the recantation statute in the way it was used here flies in the face of the specific intent of Congress when it passed the measure which was to encourage truthful testimony before a grand jury by permitting prompt recantation.

The Government's Failure to Reveal the Existence of Tape Recorded Conversations Between Appellants and Morales Prior to Their Appearance Before the Grand Jury Was Improper

Kaufman appeared before a grand jury in the Southern District of New York on February 2, 1973, and was questioned about his involvement with Morales and Del Toro. Del Toro appeared before the same grand jury on February 16, 1973 and

was questioned in a similar manner. The Government relied upon and took its questions from tape recordings of conversations made during the period from September 20, 1972 to January 26, 1973, between appellants and Morales. At no time prior to or during their appearances did the Government reveal the existence of these tape recordings of their conversations with Morales to them (App. 142; Tr. 853).

The failure by the Government to reveal the existence of the tape recording may have been motivated by the desire to add perjury counts to any proposed indictment of Kaufman and Del Toro. Regardless of what motivated the Government it is crystal clear that it in no way advance the knowledge of the grand jury with respect to their investigation. The possibility that it was done simply to manufacture more counts for an impending indictment was raised by Judge Knapp at trial (Tr. 444-69).

While there may be "no duty upon the prosecution to inform a witness, even a potential defendant, of the testimony of other witnesses before the grand jury", United States v. Winter, 348 F.2d 204, 210 (2d Cir.), cert denied, 382 U.S. 955 (1965) (emphasis supplied), there should be a

duty to disclose to a potential defendant the existence of recordings of his own conversations before he testifies before a grand jury, particularly where, as here, it would have avoided false statements and encouraged his cooperation with the United States Attorneys Office. This is clearly the law where candid disclosures, such as those which should have been made by the Government here, could not hamper or impede the grand jury investigation.

Kaufman Completely Recanted His False Statements Before the Grand Jury

Kaufman's actions subsequent to his appearance before the grand jury constituted a complete recantation of any false statements he may have made before the grand jury. The attempt by the Assistant United States Attorney to foreclose recantation immediately after Kaufman testified did not prevent recantation.

Section 1623(d) of Title 18 of the United States Code provides that:

> "Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest

> that such falsity has been or will be exposed."

Under the terms of the statute an admission that prior statements are false amounts to a recantation or retraction of the statements and thus will bar prosecution for perjury. Broken down, the elements required to come within the statute, are:

1. the witness must admit the statements he made are false;

2. the admission must be made in the same continuous grand jury proceeding in which the declaration was made;

3. the false statements must not have substantially affected the grand jury proceeding; and

4. it must not have become manifest that the falsity of the statements has been or will be exposed.

An examination of the facts in the case at bar show that Kaufman fulfilled each of these elements.

It is precisely this kind of conduct which Congress hoped for when it enacted the legislation and on which avoidance of the penalties for perjury were granted. Congress found that the bill would serve:

> " * * * as an inducement to the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk [of]

> prosecution in doing so." 2 U.S. Code Cong. & Admin. News 4024 (1970). (H.R. Rep. No. 1549, 91st Cong. 2nd Sess. (1970).)

United States v. Lardieri, 497 F.2d 317, 320-21 (3d Cir. 1974).*

1. Kaufman clearly admitted that his statements before the grand jury were false in the course of his cooperation with the Government. His false testimony in substance

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* In Lardieri, a recently decided Third Circuit case which is one of the few cases to discuss the implications of the recently enacted recantation provision of Title 18 U.S.C. Section 1623, the Court quoted this language and added:

> "Basically, the reason for having a witness testify before a grand jury is to discover the truth, not to lay the groundwork for a perjury prosecution. *** "
>
> "While Congress made it easier to secure convictions under §1623, it balanced its approach to some degree by adding a recantation provision, §1623(d), which could be helpful to a witness. *** "
>
> "That this was to encourage disclosure by utilizing a combination of the carrot and stick approach is clear from the legislative history" (497 F.2d, at 320-21).

The Government cannot be permitted to thwart so clear a legislative purpose by using the perjury statute primarily to create perjury charges.

was that he had not offered a $15,000. bribe to Morales; that he had not given Morales $500.; and that he had not discussed the payment of money to Morales with Del Toro (Tr. 697-756). Directly following his testimony in the grand jury, Kaufman candidly discussed his involvement with Morales and Del Toro at length and in detail with several Assistant United States Attorneys and investigators. His cooperation with the Government is itself evidence that both sides considered the falsity of these statements to have been admitted during his period of cooperation. In addition, Kaufman participated in taped conversations with Del Toro and Ralph Ruocco which were premised on his having done the acts charged, and during which he made specific statements on tape which directly contradicted his false statements to the grand jury.

2. Kaufman's admissions were made in the same continuous grand jury proceeding in which the false statements were made. Kaufman initially appeared before the grand jury on February 2, 1973, and subsequently made three other appearances before the grand jury (on February 9, 16 and 23, 1973). His admissions, which were made during his cooperation with the Government, began on February 6, 1973 and continued until a few days prior to his last appearance on February 23, and thus were clearly made during the grand jury

investigation. (App. 130-39; Tr. 841-50).(Indeed, the grand jury proceeding involving him continued until April 4, 1973 when he was indicted.)*

3. Kaufman's false statements had not substantially affected the grand jury proceeding when he admitted they were false. He admitted that these statements were false during his period of cooperation with the Government, which began on Tuesday, February 6, 1973, four days after the false statements had been made, and as soon as it was practicable

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* Short shrift may be made of any suggestion that, since Kaufman did not make these admissions directly to the grand jury, he did not make his admissions "in the same continuous grand jury proceedings" as required by the statute. Kaufman was not questioned further by the Government about his involvement with Morales or Del Toro at his three subsequent appearances before the grand jury, nor did he make any statements to them concerning his false declarations. Neither Kaufman nor the Government believed that further statements were necessary for an effective recantation. In fact, it was the Government's position that no further testimony was necessary because, in exchange for Kaufman's cooperation, there would be no perjury counts in any indictment against him. It is sufficient that both sides at the time believed that the admissions had been made and acted according to that belief. Here, as in United States v. Crandall, 363 F. Supp. 648, 654 (W.D. Pa. 1973) aff'd, 493 F.2d 140 (1974), the admissions were made "during the continuity of the original grand jury and *** the statement afforded to the government was equivalent to having been made in the grand jury proceeding." As in Crandall, the Government did not recall the witness "although very apparently they had the ability and [Kaufman's] consent to do so." (Crandall, supra at 654.)

for him to make the admissions.* Under these circumstances it is clear that Kaufman's statements could not have substantially affected the grand jury proceeding before he admitted they were false, since the grand jury did not meet again to consider Kaufman's case until February 9, 1973, when he appeared before them for the second time - three days after he had begun his cooperation with the Government and had admitted his prior testimony was false.

Since the false statements Kaufman made to the grand jury did not substantially affect the grand jury proceeding before he effectively recanted them, Kaufman's statements could not have been material, as a matter of law, since the Government then possessed tape recorded conversations of the very things he had denied before the grand jury. His testimony, by definition, could not have been material under the test of materiality in the Second Circuit and elsewhere. This test is set forth in a frequently cited passage in Carroll v. United States, 16 F.2d 951 (2d Cir.), cert. denied, 273 U.S. 763 (1927), in which the Court said that a false statement is only material if it "has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing

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* Kaufman's lawyer, Irwin Klein, called the Assistant United States Attorney on the afternoon of Friday, February 2, 1973 to arrange the February 6 meeting.

its investigation." Accord, United States v. Stone, 429 F.2d 138, 140 (2d Cir. 1970); United States v. Marchisio, 344 F.2d 653, 665 (2d Cir. 1965); United States v. Collins 272 F.2d 650, 653 (2d Cir. 1959), cert. denied, 362 U.S. 911 (1960); United States v. Alu, 246 F.2d 29, 32 (2d Cir. 1957); United States v. Moran, 194 F.2d 623, 626 (2d Cir. 1952), cert. denied, 343 U.S. 965 (1952); United States v. McGovern, 60 F.2d 880, 889 (2d Cir. 1932).

If there had been no tape recordings of conversations with Kaufman and Del Toro when Kaufman initially appeared before the grand jury, his false statements couldn't conceivably have hampered the grand jury investigation and would then have been material. However, the Government had the tapes available to dispel any false impressions created by Kaufman's testimony. Indeed, if the Government had played the tapes for the grand jury before Kaufman testified, his testimony would have been superfluous.*

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* It is worth noting that even if Kaufman's statements could be said to have substantially affected the grand jury proceeding adversely, which they did not, it is equally true that his later statements made while he was cooperating with the Government had a favorable counter-effect on the investigation, i.e., his tape recorded conversations with Ralph Ruocco permitted the grand jury to indict Ruocco. Since the grand jury was never told of his cooperation, Kaufman was never credited with this in any way.

4. Finally, it had not become "manifest" to Kaufman that the falsity of his statements before the grand jury had been or would be exposed when he admitted that they were false. It is difficult here to ascertain precisely when it became "manifest" to Kaufman that his perjury had been or would be exposed, within the meaning of the recantation statute.* The Government argued at trial that it must have been obvious to Kaufman that he had been or would be exposed when the Assistant United States Attorney told him of the existence of tape recorded conversations between Morales and himself and read the recantation provision to him immediately following his initial appearance before the grand jury in which he testified falsely, but this is an unfair conclusion not warranted by the law or the facts. A far more equitable construction is one which allows a reasonable time for recantation after the witness knows it is possible to recant, and Kaufman undeniably recanted effectively under this test.

Kafuman may have suspected that the evidence against

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* A thing is said to be "manifest" when it is "obvious," "apparent," or "plain" to the understanding. Random House Dictionary of the English Language, 871 (1969).

him would expose his false statements at trial. However, it goes too far to conclude that it was "manifest", i.e., "plain" or "clear" to him that all his false statements would be exposed until he heard the tapes, or at least until he discussed the events of the morning with his lawyer immediately after he left the United States Attorney's Office. His failure to recant completely before he left the courthouse indicates that he was not at all clear that his false statements would be exposed.

If the recantation provision of Section 1623 is not to be rendered meaningless, it clearly must be read to allow a witness a reasonable time to reflect on the evidence available to him before it can be said that it is manifest to him that his false testimony has been or will be exposed.* It is indisputable that here, as in every case where a witness

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* This is especially true, when, as here, the procedures employed by the Government tend to obscure the nature and extent of the evidence possessed by the Government. Kaufman initially appeared as a witness before the grand jury unaware that he was a target of the investigation and without counsel. The Assistant United States Attorney initially questioned him without telling him that he was a target, though he gave this warning after a few pages of testimony. The Government made no attempt to confront Kaufman with the tape recorded conversations prior to or during his apperance. Immediately after Kaufman testified, he went without counsel to the Assistant's office where he was given some indication of the

decides to recant, it may be known to the witness that his prior testimony will be exposed as false before he makes any admissions. But it is equally true that Congress could not have intended to cut off the opportunity to recant before giving the witness a reasonable time in which to make his admissions because the expressed intent of Congress is to encourage prompt recantation, and not, as Lardieri, supra points out, to lay the groundwork for a perjury prosecution (497 F.2d at 320) Kaufman made his admissions within a reasonable time (i.e., no more than four days after he made the false statements, and, in a sense, the same day when his lawyer called the Assistant United States Attorney to arrange what turned out to be cooperation negotiations), and should not be penalized for doing exactly what the recantation provision was intended to encourage.*

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of the evidence the Government had against him without any specific demonstration that the evidence was conclusive or even of what it said, i.e., the Government did not offer to play the tapes or any protion of them or to show Kaufman transcripts of the tapes.

* Title 18 U.S.C. Section 1623 is a comparatively recent statute, and there is little case law which discusses the issue of when it is manifest to a witness that his statements have been or will be exposed. A leading case on this issue in the Second Circuit is United States v. Kahn, 472 F.2d 272, 283 (2d Cir. 1973), cert. denied, 411 U.S. 982 (1973), which found that it had become manifest that the defendant's statements had been or would be exposed without specifying

Kaufman Could Not Have Been Foreclosed From Recantation Until a Reasonable Time After He Had Learned of the Existence of a Recantation Provision

The Government had an affirmative obligation to inform Kaufman that a recantation provision existed before it could effectively foreclose any recantation and charge him with perjury. United States v. Lardieri, supra at 321. The Assistant United States Attorney repeatedly warned Kaufman during his appearance before the grand jury of the severe penalties for perjury, but did not tell him that by correcting his false statements promptly he could bar prosecution for perjury under the recantation provision during this appearance. Lardieri indicates that under such circum-

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why this was so. The court below (Motley, J.) reached its conclusion that the falsity was manifest on the ground that other defendants had altered their previous grand jury testimony in such a way as to call into question Kahn's truthfulness before he had admitted his statements were false. United States v. Kahn, 340 F. Supp. 485, 489 (S.D.N.Y. 1971). This was clearly not the case here, since Kaufman had admitted his false statements before any other witness had even testified. Kaufman began his cooperation on February 6, 1973, but Del Toro, the first other witness to testify did not appear before the grand jury until February 16, 1973, and in any case, never admitted that his statements were false.

In United States v. Crandall, 363 F. Supp 643, 655 (W.D. Pa. 1973), the court found that it had become manifest to Crandall that the falsity of his statements would be exposed. However, in that case the witness waited two months after he made his false statements to recant just prior to his indictment. Kaufman recanted as soon as he could speak to his lawyer about the matter.

stances a witness must know of the possibility of recantation before he can be prosecuted for perjury. At the very least, Kaufman must have had a reasonable time after he was informed of the existence of a recantation provision following his appearance before the grand jury before it can be said that he was foreclosed from using it. It is beyond argument that he recanted fully almost immediately after he heard the recantation statute read to him for the first time.

It follows from the foregoing that Judge Knapp's charge on recantation was clearly erroneous.* Under this charge Judge Knapp assumes that any attempt by Kaufman to recant failed and that as a matter of law the defense of recantation was not available to him, even though the facts strongly support the conclusion that Kaufman made an effective recantation under the circumstances.

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* "Finally, you have heard a fair amount of argument about so-called recantation. As to that I'll simply advise you as a matter of law that if you find the testimony of any defendant or any of them to have been willfully false under the rules that I have laid down to you then nothing that either of these defendants said or tried to say either before the Grand Jury or elsewhere would give them a legal defense under the doctrine of recantation. However, in considering the question of whether any testimony you may find to have been false was willfully so, you may consider any conduct of the defendants, of either defendant, either before the Grand Jury or subsequently in the offices of the United States Attorney or indeed anywhere else which you find has a legitimate bearing on the question of willfulness" (App. 234,241; Tr. 1531, 1538).

POINT II

THE GOVERNMENT'S FAILURE TO DISCLOSE APPELLANT KAUFMAN'S COOPERATION TO THE GRAND JURY VIOLATED DUE PROCESS

The Government's failure to disclose Appellant Kaufman's cooperation for two weeks during February 1973 to the grand jury before asking them to vote was fundamentally unfair and constituted a violation of due process of law.

On February 6, 1973, Kaufman began a period of cooperation with the United States Attorney's Office for the Southern District of New York and the New York City Department of Investigation which lasted until shortly before his last appearance before the grand jury on February 23, 1973. During his cooperation Kaufman admitted his involvement with Pedro Morales, William Del Toro and Ralph Ruocco and answered every

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* The assertion that this cooperation was never revealed to the grand jury is based on the testimony of Eleanora B. Giatti, the secretary of the grand jury, at trial to the effect that she did not remember ever being told that Kaufman had cooperated with the Government (App. 113; Tr. 687).

question asked of him by the Government candidly and completely. In the course of his cooperation, Kaufman also agreed to engage in tape recorded conversations with William Del Toro and Ralph Ruocco, who were subsequently indicted as co-defendants with him. Pursuant to this agreement Kaufman engaged in three tape recorded conversations, two with Ruocco and a third with Del Toro (App. 130-139; Tr. 841-50).

The first conversation was recorded by Morales, wearing a concealed recording device, at the Ludwig Baumann Building in East Harlem between Kaufman and Morales, acting as agents for the Government, and Ruocco, and this recording is the first concrete evidence of Ruocco's role in bribing Morales. At this meeting, Kaufman engaged in a conversation in which Ruocco discussed his participation in their agreement with Morales. In the course of their conversation, Ruocco specifically agreed that Morales would be paid the remaining $14,500. of his bribe when the Ludwig Baumann Building lease was signed, and that a prior payment of $500. was only a token of good faith (GX 12; Tr. 504-07). Kaufman taped a second conversation with Ruocco on February 14, 1973 under the supervision of Stanley Lupkin, First Deputy Commissioner of the New York City Department of Investigation, from a

telephone at the Department of Investigation. During this conversation Ruocco reaffirmed the substance of his conversation with Kaufman and Morales the previous day, and further implicated himself in the conspiracy to bribe Morales (GX 12, 20; Tr. 508-09). On February 15, 1973, Kaufman, wearing a concealed recording device, taped a conversation with Del Toro at Del Toro's office in East Harlem. This conversation centered on a discussion of Kaufman's prior testimony before the grand jury, and the extent to which this questioning revealed that the Government knew of their involvement with Morales. Kaufman asked Del Toro for advice as to how he should proceed, but their discussion ended without producing any conclusive statements from Del Toro.

Kaufman ceased his cooperation with the Government after approximately two weeks (App. 146-48,162-63,184; Tr. 847-49; 1260-61, 1282). While he was cooperating with the Government, and immediately thereafter, Kaufman made three appearances before the grand jury, but was asked no questions about his cooperation with the Government and did not make any statements.

At no time did any Assistant United States Attorney disclose to the grand jury that Kaufman had cooperated with the Government fully for over two weeks, that he had engaged in tape recorded conversations on behalf of the Government

which contributed materially to the indictment of Ruocco and Del Toro or for that matter that he had during his period of cooperation recanted any and all the false statements for which the grand jury was being asked to indict him (App. 113; Tr. 687).

Whatever motivated the Government's failure to disclose such vital and exculpatory information concerning Kaufman to the grand jury was less than fair and clearly violative of due process guaranties. Such disclosures would necessarily have changed the grand jury's view of him and undoubtedly would have influenced their vote. The potential influence of such disclosures cannot be discounted, especially where, as here, the Government itself played an active role in creating and developing the fact pattern which promoted the bribe to Morales.

The Government is under an affirmative

obligation to present mitigating or exculpatory evidence to the grand jury whether that evidence would tend to establish innocence, to mitigate the degree of the offense or to substantially aid the defense in some other way. The Approved Draft of the American Bar Association Project on Standards for Criminal Justice states in the Commentary on the Standards Relating to the Prosecution Function (1971) that:

> "A prosecutor should present to the grand jury evidence which would reasonably tend to negate the guilt of the accused ***[s]o that an evaluation of probable cause can be made by an entity independent of the prosecutor. Such a procedure tends to insure public confidence in the ultimate decision as to prosecution. The obligation to present evidence which tends to negate the guilt of the accused flows from the basic duty of the prosecutor to seek a just result." (§3.6 Commentary at 89)*

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* While these standards were intended primarily as a guide to the professional conduct of prosecutors and other lawyers and as a basis for disciplinary action, and not simply "as criteria for the judicial evaluation of prosecutorial misconduct to determine the validity of a conviction," they are clearly relevant under the circumstances here to such judicial evaluation of prosecutorial misconduct.

United States v. Geller, 154 F. Supp. 727 (S.D.N.Y. 1957) illustrates why the failure to disclose here should render the indictment defective. The Court in Geller found that the defendant's recantation did not operate as a matter of law to purge his initial false statements and therefore that the indictment was not rendered fatally defective by the failure of the prosecution to disclose the recantation to the grand jury. In this case, a finding that Kaufman had recanted would have absolved him from criminal responsibility for his false statements as a matter of law, and there was therefore no rationally persuasive evidence before the grand jury with respect to Kaufman's perjury when the recantation which resulted from his cooperation is considered. The Court in Geller also found that the grand jury "would not have deviated from its original decision to indict" (154 F. Supp. at 731), even if it was told of the recantation. In Kaufman's case there can be no such

conclusion, since he not only recanted but also actively cooperated with the Government and contributed substantially to its case against Ruocco and Del Toro by doing so. Knowledge by the grand jury of this contribution might well have been a vital ingredient in their decision to indict or to vote a no true bill.

The failure of the Government to disclose such facts to the grand jury might have been ameliorated by a full disclosure at trial, but this was foreclosed by the court. The examination of the secretary of the grand jury as to whether Kaufman's cooperation had been revealed, and the effect of such a revelation was not permitted (App.109-10,114; Tr. 683-84, 688).

The prejudicial effect of Judge Knapp's refusal to allow further questioning on this point was again compounded by his charge to the jury on this issue where he said:

> "***it should not make the slightest difference to you what motivated the grand jury in voting this indictment. You will remember Mr. Baer's arguments about which may or may not have been told the grand jury. Such arguments have no bearing on the problem before you and you should ignore them." (App. 212 ; Tr. 1509)

The Government's failure to inform the grand jury and the foreclosure of examination by the Court at trial are reversible error.

POINT III

DEFENDANT KAUFMAN'S CONVICTION ON TWO COUNTS OF BRIBERY MUST BE REVERSED, SINCE THE GOVERNMENT FAILED TO PROVE THAT PEDRO MORALES WAS A "PUBLIC OFFICIAL"

Defendant Kaufman was convicted of offering $15,000. to a public official and giving $500. to a public official, in violation of the federal bribery statute (Title 18 U.S.C. Sections 201(b) and 2.

A vital element of proof under the statute is the character of the person to whom the alleged bribe is offered or given. He must be a "public official" that is, a:

> "***person acting for or on behalf of the United States, or any department, agency or branch of Government thereof,... in any official function, under or by authority of any such department, agency, or branch of Government***." Title 18 U.S.C. Section 201(a) [Emphasis supplied].

Thus, a person must satisfy at least two criteria before he may be deemed a "public official" under the statute: (1) he must be acting "for or on behalf of the United States." and (2) he must be acting in an "official function."* The evidence

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* It is clear from the statute that these criteria are objectively determined. Thus, a "public official" does not qualify as such because the accused believes him to be a public official, but only if the person is in fact a person qualifying under the terms of the statute.

at trial failed to show that Morales, the corrupt Model Cities employee allegedly bribed, was a public official on either of the grounds set forth above.

Morales Fails The "For Or On Behalf Of" Test Mandated By The Statute

Despite the federal government's obvious interest in the New York City Model Cities program, the Government has failed to establish as a matter of law that Morales, a New York City employee, was working "for or on behalf" of HUD, as alleged in the indictment and relied upon to support conviction. In Krichman v. United States, 256 U.S. 363 (1921), the court held that a porter in Pennsylvania Station in New York was not a public official, or, was not acting "for or on behalf of" the federal government, even though Penn Station was then being operated by the United States (under emergency powers, during World War I). In United States v. Furer, 47 F. Supp. 402, 405 (S.D. Cal. 1942), where the United States had contracted with Lockheed for the production of aircraft, Lockheed's employees were deemed not to be public officials so as to make the bribery statute applicable.

It is inconceivable that the "for or on behalf of" language of the bribery statute could have been intended to encompass every employee of a local government program

sponsored in whole or in part by the federal government. In United States v. Archer, 486 F.2d 670, 678-683 (2d Cir. 1973) the court refused to "stretch to the limits" the language of the Travel Act, Title 18 U.S.C. Section 1952 to find jurisdiction in the federal courts where the interstate commerce was minimal, insignificant and entirely contrived by the Government to meet the jurisdictional requirement of the statute. Similarly, 18 U.S.C. Section 201(a) should not be stretched in any case in order to label the deputy assistant administrator of a small regional office of a city agency a federal public official.

However, even if a Model Cities employee such as Morales were deemed in a position to act for or on behalf of HUD, he would still not qualify automatically as a "public official", unless he were actually "acting for or on behalf of" [emphasis supplied] the federal government at the time of the bribery. The evidence adduced at trial is indisputable that, at the time of the alleged bribes, Morales had long since stopped doing any work for Model Cities. He had, in fact already become primarily an agent for the United States Attorney's Office in the Southern District of New York. His sole purpose in this capacity was in actuality that of informer. Surely, if Model Cities had known of Morales' earlier wrongdoing he would

have been fired. The United States Attorney's Office has attempted, then, to say that, although Morales was a crook and a known crook, and in fact, an arrested, charged and admitted crook, we didn't tell anyone at Model Cities or, if we did, it was with the promise that Morales would stay on at Model Cities and in this way continue to be the kind of employee which permits federal jurisdiction. This bootstrap reasoning is just plain wrong.

Morales Also Fails The "Official Function" Test Mandated By The Statute.

Defendant Kaufman's conviction for bribery must also be reversed because of the Government's failure to prove that Morales was "acting ***in any official function, under or by authority of [the federal government]" at the time of the alleged bribery. *

The fact that no payment or offer of payment of money was made until well after Morales had begun working as an undercover agent of the United States Attorney's Office alone negates any possibility of his having been engaged in any "official function" on behalf of HUD. By that time, Model Cities was his employer in name only.

* The District Judge appeared at one point to wholly endorse defendant's view that Morales was not acting for or on behalf of HUD at the relevant time, or at least not in an official capacity (App. 197-98).

Furthermore, at the time of the "negotiations" for the lease of the Ludwig Baumann Building, the subject of the alleged bribery, Morales had no authority to approve or even to recommend the approval of the lease. Even if his "official function" was as a Model Cities employee, and we submit it was not, the Real Estate Department of the City of New York had exclusive jurisdiction in such matters. Morales' only authority was to make a recommendation with respect to the site (Tr. 222-23; 246; 248).

The requirement that a public official be engaged in an official function in order for the bribery statute to apply has long been established by the courts. United States v. Birdsall, 233 U.S. 223 (1914); Blunden v. United States, 169 F.2d 991 (6th Cir. 1948). See also Annot., 115 A.L.R. 1263 (1938); 122 A.L.R. 951 (1939); 11 C.J.S. Bribery Section 2e(1) (1938). Admittedly, the courts have construed this requirement liberally, and have deemed it satisfied where the official had some influence to effect the result for which the alleged bribe was offered. United States v. Birdsall, supra; United States v. Carson, 464 F.2d 424, 433-434 (2d Cir.), cert. denied, 409 U.S. 949 (1972); Wilson v. United States, 230 F.2d 521 (4th Cir.), cert. denied, 351 U.S. 931 (1956); Browne v. United States, 290 F. 870, 872 (6th Cir. 1923). Yet, in Blunden v. United States, supra where a government employee had neither the

authority to give nor even to recommend that which the accused sought, the court held the bribery statute inapplicable.

At one point during the trial of the instant case, the court interpreted defendant's argument as one of impossibility, i.e., since Morales had no authority, the purpose of the alleged bribery could not be achieved: therefore there was no bribe. The argument runs differently and to the effect that under this particular criminal statute, no bribery is committed unless the person bribed or solicited is a "public official". That status cannot be achieved as a matter of law unless such person is actually acting in an official capacity. That he may have been cloaked with authority, that the Government may have "arranged" to have him remain on the Model Cities payroll, or that the "bribor" may have considered him to be acting in an official function is totally irrevelant.

If Any Crime Was Commited, It Was A Matter For State, Not Federal Concern.

It is apparent that the Government has done in this case precisely what it did in the Archer case. It has set up a federal crime, in Judge Friendly's words, by "needlessly inject[ing] the federal government into a matter of state concern." United States v. Archer, supra, at 672. The result

is the same as that of extending the Travel Act in the manner sought by the Government in Rewis v. United States, 401 U.S. 808 (1971), which the court rejected, saying that such an extension would "alter sensitive federal-state relationships,***overextend limited federal police resources,***[and] transform relatively minor state offenses into federal felonies." Such an extension in this case will also overextend limited federal judicial resources.

If defendant Kaufman may be held to have committed a crime against the United States in this case, then anyone engaging in criminal conduct where federal funds may be involved, however indirectly and in however insignificant an amount, is similarly subject to criminal prosecution by the United States. In the absence of specific evidence of such an intent by Congress, this court should not countenance such a result.*

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* As evidenced by the following portion of the examination by Assistant United States Attorney Giuliani of defendant Kaufman before the grand jury, February 2, 1973, the Government seems to acquiesce in defendant's view that any bribery committed was a violation of state law.

"Q Did you want to change your testimony about that, did Mr. Morales ask you for any money?

"A Well, I would change my testimony in the light of your questioning. Mr. Morales did ask me for money.

"Q Do you want to tell us about that?

"A Well, he was talking about $15,000 and I told him I would take it up with the company and see if I can get it but nothing happened.

"Q You realize of course that if that in fact happened, if Mr. Morales offered you money or asked for money, he was at that time committing the crime of bribery under State law?" (Tr. 739; emphasis supplied).

POINT IV

DEFENDANTS' CONVICTION FOR CONSPIRACY MUST BE REVERSED, SINCE THE GOVERNMENT FAILED TO ESTABLISH ANY FEDERAL INTEREST IN THE TRANSACTIONS BETWEEN DEFENDANTS AND MORALES

Count One of the indictment charges defendants with conspiracy to defraud the United States (Title 18 U.S.C. Section 371) by depriving it of the impartial services of Pedro Morales. As pointed out in the charge below, this was allegedly done by bribing Morales (App. 219 ; Tr. 1516). Thus, if the court had no jurisdiction over the bribery defense, the conviction of defendants for conspiracy must also be reversed.

It is undisputed that the United States is entitled to protection from fraud, i.e., to have its programs administered honestly. In order to establish defendants' guilt under the conspiracy statute, however, the Government had to prove that there was an interest on the part of HUD in the specific transactions alleged in the indictment and testified to at the trial. The Government failed in its

proof, because the grant of funds by the federal government to the New York City Model Cities program was not and could not have been tied to the transactions constituting the alleged conspiracy.

The only cases in which courts have upheld federal convictions for conspiracy to defraud the United States under similar circumstances differ significantly in their facts from the instant case. In Harney v. United States, 306 F.2d 523 (1st Cir. 1962), cert. denied, 371 U.S. 911 (1962), for example, affirming a conviction involving a program funded by the federal government under the Federal Aid Highways Act, Title 23 U.S.C. Sections 101 et seq., the court pointed out that approval of the Secretary of Commerce had been obtained for the specific expenditures, that funds previously apportioned had been allocated and the federal government was commited. Thus "federal participation was not a mere vague possibility for some time in the future but an immediate practical reality with federal funds set aside." Harney, supra, at 531.

Similarly, in United States v. Loschiavo, infra, federal funds were committed to the specific project (rental of sanitation facilities) and were ultimately expended for rent.*

In United States v. Thompson, 366 F.2d 167 (6th Cir.), cert. denied sub nom. Campbell v. United States, 385 U.S. 973 (1966), affirming a conviction based upon kickbacks on a project funded by the federal government under the Hill-Burton Act, Title 42 U.S.C. Sections 291 et seq., federal funds for the specific

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* As stated by the Government in that case on page 14 of its brief before this court (Docket No. 73-2832),

> "With particular reference to the sanitation facility housed in Loschiavo's building, HUD specifically authorized an expenditure of federal funds ($852,600) to cover the cost of a Neighborhood Cleanup Program in the Harlem--East Harlem Model Cities area, including the rental of a sanitation facility, which the City arranged to operate through its Department of Sanitation, under HUD's guidelines concerning record keeping, documentation of costs, audits and inspections, conflict of interest, and others. Pursuant to this arrangement, HUD funded 100% of the rental due to Loschiavo for his building."

project had been solicited and committed. The kickback was solicited and received in return for an architectural contract which was awarded following the commitment of funds. Under these circumstances, the court held (relying on dicta in United States v. Harney, supra) that it was unnecessary for the Government to prove that the United States funds were actually used to reimburse the state for the added expenses incurred as a result of the kickbacks, since the United States was entitled to have its program administered "honestly and without corrupt influence." Thompson, supra at 171.

It is in this language that Count One of the indictment in the instant case was drawn.
Any reliance upon Thompson, however, to support jurisdiction, is clearly misplaced. The Court in Thompson was able to avoid the difficulty of tracing funds only because the specific hospital construction project to which the Government had committed funds had been undertaken.
The project with respect to which the Government was

entitled to honest administration was a specific one in which its interests were clearly established.

In the case at bar, government funds were not only untraced, but uncommitted and not even subject to being committed. The negotiations for the lease of the Baumann Building were encouraged and undertaken by Morales outside of the scope of his authority and solely for the purpose of securing convictions of the defendants, at the instigation of the United States Attorney's Office. No funds were expended on the project by either the City of New York or HUD, and the project never even came to the attention of Frank Torres, a HUD representative in New York, as it would have in the ordinary course (App. 94 ; Tr. 429). Morales himself testified to the effect that he had never thought the lease would be let through the Model Cities Office (Tr. 270-71). Thus it is clear that HUD's interest in the Baumann lease was totally non-existent.

For the foregoing reasons, and because this is as much a matter for state concern as are the acts of defendants constituting the alleged bribery, the conspiracy conviction should be reversed.

POINT V

VITAL OMISSIONS IN THE DISTRICT COURT'S CHARGES TO THE JURY DEMAND REVERSAL AND REMAND FOR A NEW TRIAL ON THE BRIBERY AND CONSPIRACY COUNTS.

The Court Erroneously Failed To Charge The Jury On The "Official Function" Requirement of the Bribery Statute.

Defendant has argued above that his conviction for bribery should be reversed because the Government was unable to prove at trial that Morales was a "public official" under Title 18 U.S.C. Section 201 (b) and 2, i.e., that he was acting, at the time of the alleged bribery, both "for or on behalf of the United States" and "in any official function."

Even if this court believes, however, despite defendant's assertions to the contrary, that there was evidence in the case which could support a finding by the jury that Morales was a "public official" at the time of the alleged bribes, the court must still reverse the conviction and remand for a new trial because the jury was never charged properly on the subject.

Despite defendant's Request No. 19, seeking a charge including the "official function" language of the bribery statute, the court omitted it entirely. Instead, the court's charge, in relevant part, was as follows:

> "***you should then turn to the question of whether Mr. Morales was a public official. Official, of course, means an official of the United States. We have no jurisdiction in this Court over the bribery of any other officials. That in turn has been defined by statute as one who is acting for or on behalf of the United States or any agency thereof."
>
> ***
>
> "***On the basis of such testimony you may conclude that Mr. Morales was: "Acting for or on behalf of the United States or an agency thereof," and that he was a public official within the meaning of the statute.
>
> "If then you find these elements to have been established to your satisfaction beyond a reasonable doubt, you should convict Mr. Kaufman of bribery under the second count." Tr. 1521-1522 (Emphasis supplied)

Since the jury was never asked to determine whether Morales meets the "official function" test of the

bribery statute, it was not in a position to decide solely on the limited basis set forth by the court, whether Morales was a "public official" and therefore, whether bribery was committed under federal law. At the very least, the jury should have the opportunity to make this determination.

The Court Erroneously Failed to Charge The Jury, On The Conspiracy Count, That It Must Find A Federal Interest In The Specific Project To Which The Conspiracy Was Directed.

Defendant has also argued above, with respect to the conspiracy count, that the Government failed to prove that there was an interest on the part of the United States, i.e., on the part of HUD, in the specific transactions alleged in the indictment, to wit, the lease of the Ludwig Baumann building, and as a result, that the convictions must be reversed.

This was also the position taken by defendant at trial, yet despite defendant's request to charge on this point (defendant's Request No. 10), the court never put this question before the jury. In fact, its instructions

on conspiracy (Tr. 1515-20) made no mention of the requisite federal interest. The sole reference to this jurisdictional question was made during the court's charge on the bribery counts, as follows:

> "In the conspiracy count all you must find in this regard is that the object of the conspiracy was to some extent to subvert the Model Cities Program, and hence the objectives of the United States, by depriving Model Cities, and hence the United States, of Mr. Morales; unprejudiced judgment regardless of whether he technically fitted the definition of public official as I have defined that term to you." (Sentencing Tr. at p 1523, ll. 17-24; emphasis supplied).

That instruction is clearly erroneous, since it charges the jury that it may find defendant guilty of conspiracy based solely upon intent, without any regard for proof of governmental interest other than in the Model Cities Program generally. The charge is equally erroneous in its statement that Morales' status as a "public official" is irrelevant to the conspiracy count, since there could be absolutely no federal interest to be protected if he were not a public official at the time. For both reasons, reversal is required.

Even if Morales was a public official, the conspiracy conviction must still be reversed and remanded for a new trial, since the jury must first make the determination that the federal government had the requisite interest in this transaction to justify a federal conviction for conspiracy.

POINT VI

ERRORS OF THE TRIAL COURT

The Court Erred In Denying Defendant Kaufman's Application For An Accounting With Respect To Morales' Witness Fees

During the course of the examination of the Government's major witness, Pedro Morales, defendant Kaufman's counsel attempted to determine the extent of the remuneration provided by Morales to the Government. Obviously, this information went to the question of motive and bias, especially when it was disclosed that, in addition to monthly payments of $1000., Morales received any number of witness fees at $20. apiece and that they were probably provided by the Government to Morales on frequent occasions besides his appearances before the grand jury.

Records of the amounts and times of payments were requested to be produced by the Government by defendant Kaufman. The court initially agreed and suggested that the United States Marshal be subpoenaed, since the Assistant United States Attorney noted that the Marshal's office kept the records requested (Tr. 324).

When the Marshal's office refused to honor a subpoena for the records unless directed to do so by the United States Attorney, Judge Knapp reexamined his earlier decision and denied the request for the records. Since the records may have shown large additional payments to Morales the court's decision was reversible error.

The Court Erred In Permitting The Witness To Refer To A Memorandum Made In Preparation For Trial In Order to Refresh His Memory

During the course of the trial, the court, over objection, improperly permitted Morales to refer to notes he had prepared in contemplation of trial and not made contemporaneously with the event to which they referred in order to refresh his memory (Tr. 65, 72, 73, 74, 79, 98, 104). Notes used in this fashion must have been made on or near the time of the event to which they refer. Putnam v. United States, 162 U.S. 687 (1898). Since Morales prepared the notes a few weeks before trial the court should not have permitted him to refer to them (Tr. 71). Furthermore, the court improperly instructed the jury that "he [Morales] could refer to anything he wants for the purpose of refreshing his recollection" (Tr. 99). By doing so, the court disregarded the contemporaneous making requirement.

The Court Erred In Refusing To Permit Defendant Kaufman To Test The Tapes In Evidence Before They Were Played At Trial

The court erred in denying Kaufman's applications to test the tapes of his conversations with Morales before the Government played them at trial. Kaufman wanted an expert to test the tapes in order to improve their audibility and to be sure that the tapes had not been dubbed or otherwise altered. During the trial, Kaufman twice asked the court to permit inspection of the tapes of these recorded conversations, and the court denied both applications on the grounds that such tests were untimely and unnecessary (Tr. 277-81; 320-21).

It Was Improper For The Prosecution To Confer With His Chief Witness In The Witness Room During A Recess While The Witness Was On The Stand

During a recess in the middle of Morales' direct testimony, the Assistant United States Attorney conferred with Morales in the witness room. Counsel strenuously objected to such conduct (Tr. 147, 175-176). In light of the circumstances under which Morales testified, e.g., he was planted by the Government as a government informer and granted immunity from prosecution, such conduct was clearly prejudicial to defendant Kaufman.

Such a meeting with the prosecutor in the course of his direct testimony offers far too many opportunities to suggest future testimony to the witness, to correct errors in previous testimony and to conform his testimony to prior statements made to the Government. "Testimony of witnesses who have been told the kind of testimony they are expected to give is deserving of the severest condemnation...". Ambrose v. Reece, 186 Ky. 171, 216 S.W. 341 (1919).

POINT VII

THE FACTS AND CIRCUMSTANCES SURROUNDING THE SENTENCING OF DEFENDANT KAUFMAN WARRANT THIS COURT'S DEPARTURE FROM ITS GENERAL RULE PRECLUDING REVIEW

Despite the general rule precluding review of criminal sentences, this court has not been loath to vacate sentences in appropriate cases. See United States v. Malcolm, 432 F.2d 809, 815 n.2 (2d Cir. 1970).

Review has been granted in two broad areas. The first is in cases where the district judge has exercised no discretion whatever in setting the sentence, as in the case of mechanical sentencing, where the judge makes his determination without regard to the individual circumstances of the defendant. United States v. Schwarz, _____ F.2d _____ (2d Cir. 1974) [N.Y.L.J. (8/28/74)]. See United States v. Baker, 487 F.2d 360 (2d Cir. 1973); Woosley v. United States, 478 F.2d 139, 143-145 (8th Cir. 1973); and

United States v. Wilson, 450 F.2d 495, 498 (4th Cir. 1971).*

Review has also been granted in cases where discretion has been exercised, but abused. As stated by this court in United States v. Holder, 412 F.2 212, 214-15 (2d Cir. 1969).

> "If the sentence could be characterized as so manifest an abuse of discretion as to violate traditional concepts, it is possible

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* As perhaps best stated in Woosley, supra at 144-145,

> "The rule against review of sentences is founded primarily upon the premises that a trial judge, who has the best opportunity to observe the defendant and evaluate his character, will exercise discretion in imposing sentence.***On that assumption we ordinarily defer to the trial court's judgment. However, where as here, the district court has not exercised discretion in imposing sentence, there is no reason for us to defer to the trial court's judgment. In reviewing such a sentence, we would not be usurping the discretion vested in trial judges; rather we would be according the defendant the judicial discretion to which he is entitled.***" [Citations ommitted]

> that we might, pursuant to our power to supervise the administration of justice in the circuit, overturn our long established precedents of non-intervention and intervene."

See also Smith v. United States, 273 F.2d 462, 469 (10th Cir. 1959) (Murrah, C.J., dissenting), cert. denied, 363 U.S. 846 (1960).

In the case at bar, the district court's sentence was clearly defective on both grounds, and as such, warrants review, and upon review, reversal.

Mechanical Sentencing

The mechanical nature of the sentencing was apparent from several standpoints. First, the court accepted outright the Government's request for a sentence of imprisonment for four years for Kaufman. That request was transmitted in what might be characterized as a "one liner", devoid of any explanation whatever. Second, the court clearly evidence its predilection with respect to relative degrees of culpability, wholly apart from any consideration for the individuals

involved. Thus the court stated:

> "In general, as I think you may or may not know, I had made it public, my views, many times. In the case of official corruption, the common cry is that the corrupt official is the more important criminal. My view is that usually it is the other way around***." (Sentencing Tr. at 25, ll. 21-25).*

The court continued with a statement that the facts of this case bear out that position. To the contrary, the facts refute the court's position. Morales and Sanders, Morales' superior and the head of the Harlem-East Harlem Model Cities Office, were involved in graft up to their necks, while Kaufman was a member of the bar and without so much as a previous arrest. As pointed out in the brief filed by the United States in this court in United States v. Loschiavo, Docket No. 73-2832, at 1, n.

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* See also page 24 of this transcript, ll. 21-23, where the court also evidenced its refusal to consider the individual in determining its sentence, stating: "This is a case whereby the nature of it, the focus could not be on the individual but must be on the crime and the public nature of the crime."

> "Sanders and Morales were indicted separately in a ten count indictment, 73 Cr. 288, filed on April 4, 1973, which charged both Sanders and Morales with not only this conspiracy involving Loschiavo, Storms and DeWitt but also with two other conspiracies, all involving a total of $51,000 in bribes paid by various businessmen to obtain contracts and leases with Model Cities." (Emphasis supplied)

The mechanical nature of the sentencing is further illustrated by the court's arbitrary and unreasonable denial of defendant's request for sentencing under Title 18 U.S.C. Section 4208(a)(2). The court made the following statements:

> "THE COURT: I agree with the Government. This is not a sentence to rehabilitate Mr. Kaufman. It is a sentence to vindicate the authority of the law."
>
> "MR. BAER: The sentence does do that."
>
> "THE COURT: The sentence doesn't do that if he's let out the next day."
>
> (Sentencing Tr. at 31, ll. 17-23).

Finally, despite the recommendations made in defendant's Presentence Memorandum with respect to defendant Kaufman's work for the "800" Madison Street Block Association in Bedford-Stuyvesant (Presentence Memorandum at 22) and the presence of Ruth Fergus, Executive Director of the Association at the sentencing (Sentencing Tr. at 17), the court was apparently unwilling to consider any such proposal with counsel and even refused to hear Mrs. Fergus, who was present at great personal sacrifice ready to discuss with the court the need for Mr. Kaufman's continued service.

Disparity of Sentences

Perhaps the most egregious defect in sentencing in this case is the disproportionately long term of imprisonment set for defendant Kaufman, arising no doubt from the court's confirmed prejudice against so-called corruptors of public officials.

There were eight persons in all involved in the Model Cities cases who either pled guilty or were

convicted. The corrupt Model Cities officials were charged with counts of perjury, conspiracy and bribery relating to a series of transactions involving total bribes of $51,000. on several potential leases. They were sentenced as follows:

1. John Sanders, Director Harlem - East Harlem Model Cities Office: 2 years

2. Kingdon DeWitt, Model Cities Sanitation Coordinator: 6 months

3. Pedro Morales, Deputy Assistant Administrator, Harlem - East Harlem Office: not yet sentenced.

The other persons involved were similarly charged, although they were involved primarily in single transactions. The most serious offender, Anthony Loschiavo, was convicted of paying some $20,000 in bribes for a $540,000 lease, actually undertaken by Model Cities of a building owned by him. These persons were sentenced as follows:

4. William Kaufman, Attorney and Real Estate Broker: 4 years

5. Anthony Loschiavo, Real Estate Owner: 1 year and $5,000

6. William Del Toro, Anti-Povety Administrator: 1 year, 1 day

7. Andrew Storms, Contractor: 4 months

8. Ralph Ruocco, Real Estate Corporation Executive: 2 months*

(Principal source: Government's brief in United States v. Loschiavo).

It is obvious from the foregoing that defendant Kaufman was sentenced by very different criteria from all other persons involved in the Model Cities investigation, indictments and trials. He received twice the term of the principal Model Cities official, Sanders, who was involved in a variety of illegal schemes to his profit; he received four times the term of Loschiavo, who committed virtually the identical crime, except that Loschiavo's building was actually leased by Model Cities and rent was paid by the Federal Government to Loschiavo's substantial profit.

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* The sentence was actually 1 year and 1 day, but the remainder was suspended on condition that Ruocco serve two months in a jail-type institution. Probation was granted for the remaining ten months.

In United States v. Wiley, 278 F.2d 500 (7th Cir. 1960), the Court held at p. 503, after stating the general rule of non-review:

> " However, where the facts appearing in the record point convincingly to the conclusion that the district court has, without any justification, arbitrarily singled out a minor defendant for the imposition of a more severe sentence than that imposed upon the co-defendants, this Court will not hesitate to correct the disparity. In so doing it is exercising its supervisory control of the district court, in aid of its appellate jurisdiction. This control is necessary to proper administration in the federal system. LaBuy v. Howes Leather Co., 352 U.S. 249, 259, 77 S.Ct. 309, 1 L.Ed.2d 290."

Wiley has been implicity approved by this circuit (see 8A Moore's Federal Practice ¶32.09, at 32-125 and cases cited therein).

Defendant Kaufman contends that this extraordinary disparity of sentences, by which he is punished far in excess of other equally or more culpable persons, represents precisely such abuse of discretion as, in the language of this Court in Holder, supra,

"violate[s] traditional concepts" and warrants, "pursuant to [the court's] power to supervise the administration of justice in the circuit, overturn-[ing] our long established precedents of non-intervention " (412 F.2d at 212).*

Penalty for Failure to Plead Guilty

Finally, it would appear from the District Court's statements on pages 27 and 28 of the sentencing transcript, that the court was prejudiced against Kaufman because of his decision to stand trial. The court began sentencing at Tr. 25, 11. 2-3 by setting forth a principal consideration in its sentencing - moral responsibility. The court later stated its views that Kaufman exhibited no recognition of his moral responsibility (Sentencing Tr. 27, 11. 9-11 and 28, 11. 9-12), apparently because Kaufman failed to admit his guilt, but rather attempted to vindicate himself at trial (Sentencing Tr. at 27, 11. 12-16). While the

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* One commentator suggests that any disparity of sentences is automatically reviewable by the Appellate Courts. Rubin, Disparity and Equality of Sentences - A Constitutional Challenge, 40 F.R.D. 55, 63-69 (1966).

court pays lip service to the principal that one should not be penalized for standing trial (Sentencing Tr. at 27, ll. 22-24), that is exactly what has happened here. This alone requires a vacating of the sentence. Scott v. United States, 419 F.2d 264, 266 (D.C. Cir. 1969). The fact that the court seemed to vacillate as to the relevancy of this consideration (Sentencing Tr. at 28, ll. 12-15) is at odds with its relatively long exposition on the subject and its prior statement as to its importance.

In view of the foregoing, defendant Kaufman contends that the sentencing was replete with errors. The Court's determined efforts to vindicate public morality (Sentencing Tr. at 28, ll. 16-17), based on its preconceived notion of who the villians are who most harm that morality, the court's failure to consider the individual concerned, and the Court's imposition of a sentence totally disproportionate to those given persons of similar, if not greater, culpability, all present a clear case for exercise of

this court's power to vacate the sentence. This case also presents an excellent opportunity for the court, by reviewing the sentence, to act in accordance with the principles of more rational and humane sentencing as recently discussed at the most recent Second Circuit Sentencing conference.

Defendant asks on remand that the matter be reassigned for sentence to another judge, as in United States v. Schwarz, supra. See also United States v. Rosner, 485 F.2d 1213, 1231 (2d Cir. 1973) and United States v. Brown, 470 F.2d 285, 288 (2d Cir. 1972), or in the alternative that some direction be given to take note of other previously reserved cases with on similar or related facts.

CONCLUSION

For the reasons set forth herein, the conviction of defendant William Kaufman should be reversed on all counts.

Respectfully submitted,

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RELEVANT STATUTES

(Title 18 U.S.C.)

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section:

"public official" means Member of Congress, . . . or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; and

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent--

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States***.

* * *

§1623 False Declarations Before Grand Jury or Court

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000. or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if -

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making

the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.